Insanity and Criminal Offenders

Some Comments on the Report of Governor's Special Commissions on Insanity and Criminal Offenders

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• **The definition proposed by the Commissions on Insanity and Criminal Offenders for determining criminal responsibility will not resolve the issue between offenders who are considered blameworthy and regarded as criminals and those who are not. No formula is satisfactory for differentiating responsibility and irresponsibility. Determinism, which is the fundamental tenet of all science, is violated by the assumption that an individual can wilfully elect to commit an act which, in fact, is the result of causal antecedents. This concept is in conflict with the basic premise of criminal law that an individual is considered criminally responsible unless it can be proved to the contrary.**

Since it is unlikely that any proposal to abolish the concept of criminal responsibility would be even considered, it is suggested that no definition be used at all. Laws similar to those for the disposition of the mentally ill could be enacted, with emphasis not on the concept of criminal responsibility and moral blameworthiness but on the offender's dangerousness to others, the disposition then being planned to fit the offender rather than the offense.

THE PUBLICATION of the report by the Governor's Special Commissions on Insanity and Criminal Offenders[8] has focused the attention of the medical and legal professions in California upon the difficult and highly controversial tests of insanity. This preliminary report by the Commissions provides not only an excellent summary of the historical development of the existing laws regarding insanity but, more importantly, specific recommendations with explanations for the recommended changes. The Commissions are to be commended for their thorough and painstaking investigation of the problem of criminal responsibility of persons afflicted with mental diseases or disabilities.

On the basis of these specific recommendations by the Commissions, those of us who have been deeply interested in this problem have an opportunity to review and compare our thinking with the recommended proposals. The report of the Commissions specifies two basic objectives: "The first, to provide more adequate safeguards for the protection of the public, and the second, to bring the law insofar as possible, into conformity with the advances of modern psychiatry."

To accomplish the first objective, they recommend committing dangerous mentally disordered persons to institutions organized to maintain them in secure custody. For the second objective, it is necessary to consider the rules defining the criminal responsibility of those whose mental condition is in question. According to the Commissions, the crucial issue is to distinguish between offenders who are blameworthy and regarded as criminals and those who are not, whether an offender is condemned, or whether because of mental disorder he should be recognized as not accountable as a criminal. In accordance with this concept, punishment is justly due if the miscreant is mentally responsible. The difficulty is in determining whether the offender is to be held responsible.

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In the past, a person has not been held responsible for a crime if he is found to be insane, a lunatic, an idiot or a child under fourteen years of age. Otherwise, the law assumes that he is capable of forming specific intent to commit a particular crime unless it can be demonstrated that he is not capable of forming this intent. For a verdict of first degree murder, the prosecution must prove malice. The accused, in accordance with Section 188 of the California Penal Code, must have an "abandoned and malignant heart."

Under the present laws, the question of the mental illness of a person charged with a criminal offense has no direct bearing on the question of his criminal responsibility. An adjudication of mental illness may be entirely unrelated to the issue of criminal responsibility. In fact, although the M'Naghten formula is used for the test of insanity, there is no actual definition of mental illness. In Section 5040 of the Welfare and Institutions Code "mentally ill persons" are defined as:

"(a) Who are of such mental condition that they

are in need of supervision, treatment, care, or restraint.

"(b) Who are of such mental condition that they are dangerous to themselves or to the person or property of others, and are in need of supervision, treatment, care or restraint."

Obviously this is not a definition of mental illness but a legal provision for the disposition of persons considered to be mentally ill by the court upon the recommendation of two medical examiners. Evidently it has not been necessary to define the meaning of mental illness. Perhaps it might not be necessary to define insanity if legal provisions were made for the disposition of persons found to be dangerous regardless of their mental condition.

Probably the most famous satire in the English language is *Erewhon* (nowhere) by Samuel Butler, originally published in 1872. In this fable, the sick are blamed for their illnesses, punished and imprisoned in accordance with the severity of their illnesses while the criminals are cared for and hospitalized. The more violent the crime, the more attention and sympathy the "criminal" receives.

This reversal of moral attitudes may not be the solution. However, the story emphasizes that attitudes toward crime and punishment are the products of a culture in which a particular set of values is justified and rationalized by a sense of moral righteousness. There is no innate sanctity in man-made laws, particularly when promulgated under the aegis of bygone concepts of retribution and retaliation which are inhumane and vindictive. In the slow process of social evolution, there is a gradual recognition that a human being does not wilfully acquire an "abandoned and malignant heart," and that there is some cause for this "malicious" behavior in the life history of an individual.

By the tremendous force of his personality, as well as his sincerity, one of the greatest trial lawyers of the twentieth century, Clarence Darrow, advocated and was able to convince juries of strict determinism. The following quotation from Darrow in Irving Stone's[9] biography of the lawyer is precisely to the point:

"That man is the product of heredity and environment and that he acts as his machine responds to outside stimuli and nothing else seem amply proven by the evolution and history of man. Man's every action is caused by motive. Whether his action is wise or unwise the motive was at least strong enough to move him. If two or more motives pulled in the opposite directions he could not have acted from the weakest but must have obeyed the strongest. This is not a universe where acts result from chance. Law is everywhere. Every process of nature and life is a continuous sequence of cause and effect. There is cause for the eternal revolution of the earth around the sun, for the succession of seed time and harvest, for growth and decay and for the thoughts and actions of man.

"Before any progress can be made in dealing with crime the world must fully realize that crime is only a part of conduct; that each act, criminal or otherwise, follows a cause; that given the same conditions the same result will follow forever and ever; that all punishment for the purpose of causing suffering or growing out of hatred is cruel and antisocial; that, however much society may feel the need of confining the criminal, it must first of all understand that the act had an all-sufficient cause for which the individual was in no way responsible and must find the cause of his conduct and, so far as possible, remove the cause."

Mr. Darrow was not a social scientist or a psychiatrist but a lawyer whose long experience with criminals had convinced him that they were the helpless victims of their own drives and impulses.

At present, in California, the formula for determining criminal responsibility is the M'Naghten Rule: ". . . to establish a defense on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." In place of this, The Commissions have proposed to substitute the following definition: "A person is not criminally responsible for an act if, at the time of the commission of such act, as a substantial consequence of mental disorder, he did not have adequate capacity to conform his conduct to the requirements of the law which he is alleged to have violated."

Objections have been raised to the use of the M'Naghten rule on the basis that the definition is too obscure and not in keeping with modern knowledge and advances in the field of psychiatry. As a matter of fact, the definition is quite clear. Reduced to modern phrasing, a man is insane if he did not know what he was doing or, if he did, he did not know it was wrong because he was mentally ill. There is nothing obscure about this definition. It is simply not broad enough for modern use. When a man has a gun which he points at someone and then pulls the trigger, he certainly "knows" what he is doing and almost invariably he "knows" that it is wrong. However, in our enlightenment, we "know" that he does not really "know" and if he is mentally ill we testify that he does not "know."

Davidson[4] emphasizes that the test of responsibility in modern criminal jurisprudence is not

whether the offender "knew right from wrong" but whether he knew that his particular act was wrong, and that he knew society considered the act wrong and not that he himself considered it wrong. However, even this clear delineation of the M'Naghten rule does not prevent the confusion and disagreement of interpretation in the courtroom. When a battery of opposing attorneys examines a flock of experts, each of whom is attempting to interpret this definition in accordance with his own experience and bias, and with the litigious contentions of the lawyers and the scientific pretensions of the physicians, the original meaning of the formula is lost in the confusion of medical interpretations and legal technicalities.

Since 1921, Massachusetts has used automatic pre-trial psychiatric examinations of certain specified criminal defendants. This is done under the Briggs Law, which orders that any person who is indicted for a capital offense or who has been previously convicted of a felony be examined with a view to determining his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. It has also been suggested that such persons might be hospitalized for observation before trial. Both procedures might reduce "the battle of experts," the quantity of partisan expert testimony and the unofficial trial of the experts by the daily newspapers.[3]

In addition to the definition proposed by the Commissions, alternative definitions of merit such as the Durham, the Currens and the American Law Institute's Model Penal Code have been proposed. In each of these formulations, there is the same difficulty in drawing the line between responsibility and irresponsibility. If the definition proposed by the Commissions or any of the others were written into the law, the problem of determining the individual's criminal responsibility would remain just as difficult if not more difficult than it is under the M'Naghten rule.

The psychiatrist assumes that for every act there is a cause or causes, conscious or unconscious, and that the individual's behavior is motivated by the sum total of his experiences and influences, internal or external, acting upon him. It is presumed, therefore, that there are causal factors for every act. To assume that a human being can be influenced by the sum total of his experiences and not be determined by them, although this concept is generally accepted by the public, is unscientific and contrary to the fundamental principles of causality. In the case of a mentally ill or a psychotic person, the causal factors result in a disorder of thought, feeling or behavior. Likewise, in the case of an individual whose acts are considered criminal, causal factors are presumed to have motivated the act. If this concept were to be completely accepted, it would lead to a strict deterministic point of view in which the individual could in no way be held responsible for his behavior as his behavior would be the product of past experience and forces acting upon him over which he had no control. However, as Weihofen[10] pointed out: "Any proposal to abolish the concept of criminal responsibility directly challenges our traditional moral philosophy with regard to crime. . . . And while it may be true that the irresponsible offender must also be taken into custody, this is merely for the protection of society and of himself, and not as punishment for crime." Whereas with the "criminal," as he indicated, the public is still more concerned with the concept of moral blameworthiness than with the individual's social dangerousness.

Judge Bazelon[1] (author of the Durham decision) considers the core of the problem is man's inhumanity to man, in each of us and in the history of all of us. And he goes on to say: "Its insolubility has been sanctified by history. . . . One doesn't have to be a wild radical to see this problem as one which calls for top-to-bottom re-thinking. As Morris Cohen reminds us, 'It was the conservative President Taft, later Chief Justice of the United States, who characterized our criminal law as a disgrace to civilization.' "

Since it is unlikely that society will accept a strict deterministic point of view in the foreseeable future, the issue is reduced to either the acceptance of one of the several definitions of insanity or no definition at all. If a definition is to be used, it should define mental disorder in such a way that it is quite clear that a person so disordered is incapable of forming intent. For the psychiatrist, this is not easy; in fact, it is virtually impossible for him to accept the premise that a person did not have the capacity to commit a crime which in fact he did commit. On the other hand, the psychiatrist by training and experience can contribute explanations regarding the person's state of mind and motivations for an act. The fact that the person's unlawful act is the product of mental disease or defect (Durham rule) or the substantial consequence of mental disorder (Commissions' recommendation) may be evident to the expert but when he is expected to consider the issue of responsibility in this context, he is confronted with the problem of causality. Within the limits of the scientific approach, whether the person is mentally disordered or not, in accordance with the principle of cause and effect, the effect (or act) could not have been other than what it was. Confronted with this dilemma, the expert must ignore this basic tenet of science and concur with the usual non-scientific attitude that the person could have done other than he did if he had *chosen* to do so,

unless he was too sick to choose to do what he did. At this point, the expert's opinion is no longer consistent with scientific principles and he is making a judgment as to value on the basis of his own preconceived ideas of free choice. The expert has stepped out of his orbit and has intruded upon the domain of the judiciary, which has by law and the consent of the governed the privilege of making such judgments.

According to Perkins,[6] . . . "no cause will receive juridical recognition if the part it played was so infinitesimal or so theoretical that it cannot properly be regarded as a substantial factor in bringing about the particular result—'*de minimis non curat lex* (the law is not concerned with trifles).'" Realistic as this attitude may be for the law, science does have an obligation to give consideration to every possible cause, no matter how trifling it may seem, in accordance with the principles of scientific investigation. And although the law may accept the proximate (legal) cause on a direct cause-effect basis, the explanation for human behavior cannot be limited and restricted thus arbitrarily. Scientifically, an act is not the result of one specific cause but the sum total of causes in the life history of the individual.

The courts in California now allow the man's state of mind at the time of an offense to be admitted for consideration in reference to the facts before a verdict of guilt is reached. This permits a presentation of the man's mental condition by expert testimony in the first portion of a trial. The court and the jury have an opportunity to hear not only the facts but also the expert's opinion as to the defendant's state of mind and mental condition at the time of the alleged offense before reaching a verdict. The admission of this evidence provides opportunity for the presentation of psychiatric observations pertinent to the case whether or not a plea of not guilty by reason of insanity has been offered by the defense.

This increased latitude on the part of the courts in California provides the medical expert with an opportunity to present his scientific observations of the defendant. Having related his findings in reference to the psychodynamics, the conscious and unconscious motivations, the causal factors, the state of mind and affect of the defendant, the psychiatrist has covered the field of his expertise. As Judge Pulich[7] (formerly Public Defender, Alameda County) succinctly stated in the open meeting before the Commissions: "The doctor should come into the court, present the medical picture and depart." The decision of determining the degree of responsibility should be left to the judiciary, which represents the society for whom the laws exist. As Judge Bazelon[2] said: "When the psychiatrist goes one inch beyond his competence as an investigator and goes into the realm of being a soothsayer, he is misleading and distorting the entire process, and he is not serving the role that he is supposed to be serving."

In 1953, the British Royal Commission recommended that the M'Naughten rules be abolished and that it be left to the jury to "determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible."[5] While this would relieve psychiatrists of forming an opinion regarding criminal responsibility, it places the burden on the shoulders of the jury who, although perhaps ethically responsible (if someone must be considered responsible) are probably poorly qualified by training and experience for this judgment.

Not only are the concept of scientific determinism (which is the basic tenet of scientific investigation) and the concept of legal responsibility (which is the basic foundation of legal structure) theoretically absolutely irreconcilable, but from the practical viewpoint it is indeed discouraging to realize that no definition of insanity will work. As long as some rule of insanity is used, the experts will continue to disagree. Even if the decision were left entirely to the jury, the basic difficulty inherent in the proposition of moral judgment, of human beings evaluating and condemning others on the basis of their preconceived ideas of right and wrong, the problem would be unchanged.

Ultimately, if the situation is ever changed, our culture must give up the concept of retribution and punishment for the sake of revenge. Human beings, whether or not they exhibit behavior considered sick or criminal, are the products of this civilization. If possible, they should be treated. If untreatable, they should be isolated, not for the sake of punishment, but simply because they have demonstrated by their behavior that they are dangerous to others.

Therefore, regarding the specific recommendations of the Commissions, I would urge reconsideration of the definition of insanity. Possibly, laws similar to those for the disposition of the mentally ill could be enacted, with emphasis not on the concept of criminal responsibility and moral blameworthiness but on the offender's dangerousness to others, the disposition then being planned to fit the offender rather than his offense.

Although opinions contrary to the recommendations of the Commissions have been expressed here, this is in no way a reflection on the efforts which they have made to work out satisfactory solutions for the most difficult medical-legal problems inherent in the concept of insanity. It is my sincere hope that

the Commissions will be permitted the opportunity to continue their fine work, and that others will be given the same opportunity for constructive criticism.

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